87-154

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IN THE UNITED STATES SUPREME COURT

OCTOBER, 1986 TERM

NO. _____

JOSHUA DESHANEY, a Minor, by his Guardian ad Litem, and MELODY DESHANEY,

Petitioners (Plaintiffs)

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES; WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents (Defendants).

On Appeal from the Decision and Order of the Seventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Whether reckless, willful and wanton, or grossly negligent misconduct of public officials is enough to trigger the protections of the Due Process Clause.

2. Whether the deliberate refusal of child protection officials to act to protect an identified individual child already under their auspices, and actually known to them to be in extreme danger of death or profound injury, from an identified and known imminent danger, can be sufficiently reckless, willful and wanton, or grossly negligent as to impose

liability under 42 USC 1983.

3. Whether egregious misconduct of public officals, rising to the level of gross negligence or willful and wanton misconduct, leading to massive personal injury to an infant citizen, is excluded from the application of the civil rights laws on the basis that the misconduct was omissive in nature.

LIST OF ALL PARTIES

All parties to this proceeding in this Court, and in the Court below, are identified in the caption. Not identified are Randy DeShaney, the abusing parent, who was a party defendant in the original Complaint, and the State of Wisconsin, which was dismissed by the trial court as a party defendant. Mr. DeShaney is presently incarcerated by reason of the matters involved herein.

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SUMMARY OF THE CASE BELOW

1). The United States District Court for the Eastern District of Wisconsin granted Defendants' motion for summary judgment, and entered judgment thereon, on June 20, 1986.

2). The Court of Appeals for the Seventh Circuit heard oral argument on the appeal on January 13, 1987, and rendered its opinion, and entered judgment thereon, February 12, 1987.

3). Plaintiffs-Petitioners filed a motion for rehearing, with suggestion for rehearing en banc, on February 25, 1987, and the Court of Appeals entered an Order Denying Rehearing on April 21, 1987.

STATEMENT OF GROUNDS JURISDICTION IN THIS COURT

a) This Petition seeks review of a judgment of the Court of Appeals for the Seventh Circuit, which was entered on February 12, 1987.

b) The Seventh Circuit entered its Order Denying Rehearing on April 21, 1987. No Order has been entered extending the time for the Petition for Writ of Certiorari.

c) Petitioners believe this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 USC Section 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 USC 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF FACTS

- Summary -

Four-year-old Joshua DeShaney became totally and permanently brain-damaged as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited upon him by his father and the father's paramour. Fourteen months before his injuries became irreparable the local child protection agency began its active case management of Joshua's physical abuse situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, on their own decision and without

court action, and actively followed him at all times thereafter, dutifully recording in internal documents the child's deteriorating situation and their fears for his safety but taking no action whatever to protect the child.

- Details -

In January of 1982 the Winnebago County Department of Social Services was notified, via the police department, that one Randy DeShaney was abusing his tiny son, Joshua (the infant plaintiff herein). The DSS had a special division, the Child Protection Unit, whose precise function was to identify and protect

endangered children. (This was in response to the declared policy of Wisconsin law mandating affirmative efforts to protect endangered children and intervene on their behalf). The DSS interviewed the father, who denied the assertions against him; DSS did nothing further and closed its file.

In January, 1983, Joshua was seen in a local emergency room as a victim of child abuse, and the DSS was notified. At this time they arranged for temporary legal custody of Joshua to be taken, nominally by the hospital, while the County investigated. The investigation resulted in a multidisciplinary team meeting held in accordance with

established policy, at which the physicians, the child psychologist, the nurses, the police officers, the DSS caseworker and DSS supervisor, and the county's civil attorney were in attendance. All present acknowledged that Joshua had probably been abused. The county civil attorney, however, announced that he was unwilling to bring this abuse case to court, for undocumented reasons. The DSS officials filed their internal report, noting that child abuse was strongly suspected and promising that they would continue to actively and closely monitor the child. Most especially, these defendants promised that they would reconvene a team meeting

and bring Joshua to the Court for protection at the first additional indication of child abuse, with defendant Kemmeter saying in her report:

"I therefore recommend that the temporary physical custody order and any further allegations against this family be dismissed at this time but will refer it back into Court should there be any further injuries to this child of an unexplained nature."(Emphasis supplied).

The County gave up any thought of custody of Joshua and, on its own initiative and without a hearing, handed him back to his abusing father and the father's abusing girlfriend.

The County DSS also entered into a contract with the father whereby he was to get certain counseling, remove the girlfriend from the home, and enroll

Joshua in Head Start (thus providing independent monitoring of the child's condition). This agreement between the County DSS and the father for Joshua's benefit was ignored as soon as it was made, yet no action was taken by DSS.

Over the next fourteen months Joshua was seen repeatedly in hospital emergency rooms for suspicious traumatic injuries. On November 30, 1983, the emergency room physician directed the ER nurses to file a written child abuse report on Joshua, which they did. This report was communicated to the DSS caseworker, but nothing was done to follow up on it. DSS did not even interview the family or observe the child about this formal

medical report of child abuse.

On another occasion a Head Start worker (still trying to get him enrolled per the agreement) found four-year-old Joshua alone at home, and telephoned DSS two separate times to inform them of his immediate jeapordy, yet no action whatever was taken. The worker again telephoned a third time the following day and spoke directly to the caseworker (defendant Kemmeter), describing how she had found Joshua alone and unsupervised, with no idea where the adults were or when they might return. Still no action of any kind was taken.

Throughout this time DSS maintained an open casefile on Joshua, and assigned

a Child Protection Unit worker to his case. She (defendant Kemmeter) visited the home several times (although not in keeping with the Department's own guidelines). She claims to have had a close and caring relationship with Joshua: she would hold him on her lap and read to him, and so on. She repeatedly documented in her casefile her continuing belief that Joshua was in danger, that she did not believe the excuses proffered by the adults for the frequent injuries to Joshua, and that she was extremely worried about him. She and DSS did nothing.

Kemmeter consistently violated the requirements of both good social work and

her own agency by visiting Joshua rarely and intermittently. For the last three months of his conscious life, she even neglected to see Joshua on the few occasions when she did actually go to his home, instead in each instance accepting an excuse about his having a cold or being asleep in the middle of the day.

On one occasion the caseworker herself observed what she has repeatedly described as cigarette burns on Joshua's face. As she later told the Family Court, "On November 9, 1983, the petitioner [Kemmeter] noted markings on Joshua's chin during a home visit which resembled cigarette burns," but she and DSS took no action.

On March 8, 1984, Joshua was again taken to the emergency room. He was found to be in a deep coma, with extensive old bruising and discoloration over all parts of his body. Emergency brain surgery was done in an effort to save his life. The surgeon found massive pools of yellow liquid, consisting of the byproducts of old intracranial hemorrhages (that is, the old blood clots had been there long enough that the red blood had chemically decomposed, and only the yellow bilirubin element remained). He further found that the membrane covering the skull was stained blue, again by reason of the long-term standing and pooling of blood in the brain and the skull. Both of

these, as the surgeon testified at deposition, are unequivocal evidence of brain damage and physical trauma to the skull over a long period of time. The traumas had been inflicted on Joshua well before their cumulative effects eventually put Joshua into a coma and rendered his condition irreversible.

Throughout the time she was handling Joshua's case, the caseworker knew that he had a natural mother (plaintiff Melody DeShaney), who the mother was, and that the mother was from Cheyenne, Wyoming, where the marriage, Joshua's birth and the divorce had occurred. The caseworker had ample means of contacting the mother, but did not do so, despite clear agency

and professional guidelines to do so (and thus enlist another adult to protect Joshua). When it appeared that Joshua would die imminently the caseworker did, for the first and only time, contact the mother, to tell her that Joshua was dying.

When the natural mother and grandmother arrived in Oshkosh, Winnebago County, Wisconsin, the caseworker told them, "I just knew the phone would ring some day and Joshua would be dead."

Joshua has lost nearly half the tissue in his brain, and is profoundly and permanently retarded and brain damaged.

BASIS OF ORIGINAL FEDERAL JURISDICTION

The original basis of jurisdiction was the federal statute (42 USC 1983) creating the cause of action alleged.

ARGUMENT

Presented here are the questions whether aggravated and extreme misconduct of public officials, falling short of actual intent, suffices to trigger the protections of the Due Process Clause, whether child protection officials are liable for harm resulting from their refusal to protect an individual child they actually know to be in serious imminent danger, and whether the egregious misconduct of public officials, rising to the level of recklessness, gross negligence or willful and wanton misconduct, and leading to massive injury to an infant citizen, is excluded from the application of the civil rights laws

on the basis that the misconduct was passive in nature.

Petitioners believe this Court should grant Certiorari in this instance for three reasons: first, there now exists a clear split of authority among the Circuits on this question; second, this Court itself recently noted the significance of this question and the appropriateness of its determination in a proper case; and, third, the prompt resolution of this question is of major importance to several thousand child protection agencies and untold numbers of endangered children in this country.

I. The Decisions of the Courts of Appeal on This Issue Are Now in Conflict as a Result of the Decision in the Court Below.

The question at issue was addressed by three Courts of Appeal prior to the decision in the Court below. Doe v New York City Department of Social Services, 649 F.2d 134 (2nd. Cir. 1981); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd. Cir. 1985); Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, ___ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985).

All three of those other Circuits decided, in highly similar factual circumstances, that in proper factual settings the aggravated misconduct of public officials in failing to protect a

particular child whom they knew to be in serious physical danger (whether the misconduct is denominated as recklessness, willful and wanton misconduct, gross negligence, or by some other similar phrase) does constitute an actionable wrong under 42 USC 1983.

The same question was presented in the Court below. The Seventh Circuit pointedly noted that the misconduct here involved is extreme and unjustifiable. However, unlike the other Circuits, the Court below ruled that even profoundly aggravated misconduct (such as it found to exist in this case) could not, as a matter of law, give rise to enforceable rights under Sec. 1983. In effect it

ruled that the only actionable misconduct in such cases would be where the public official physically commits the assault, and that to stand by and allow another to commit the act, despite overwhelming awareness of the impending danger to the child, is of no legal significance.

II. This Court Itself Recently Noted the Significance of This Question and the Appropriateness of its Determination in a Proper Case.

In the companion cases of Davidson v. Cannon, 474 U.S. ___, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) and Daniels v. Williams, 474 U.S. ___, 88 L.Ed.2d 662, 106 S.Ct 662 (1986) this Court ruled that mere ordinary negligence cannot be the predicate for Sec. 1983 liability. The Court went out of its way to enunciate that only garden-variety negligence was being there addressed, and that those decisions did not address the question of liability for aggravated misconduct. The Court, at footnote 3 in Daniels, said:

". . .[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness

or 'gross negligence', is enough to trigger the protection of the Due Process Clause."

The present case squarely raises the question which this Court noted to be still in need of resolution.

III. The Question of Sec. 1983 Liability for Extreme Negligence is Important to Every Child Protection Agency and to Every Endangered Child.

Petitioner agrees with the observation of the Court below that a ruling in Petitioners' favor would be of major significance to every child protection agency in the nation. Awareness of prospective liability is, of its very nature, conducive to amelioration of conduct. This is the prophylactic effect of the law.

As matters presently stand, no agency anywhere can be certain of its legal obligations, since the Circuits have divided on the question. In view of the potential significance and

application of the answer to the question posed it appears it would be helpful to every agency to know, definitively, how assertive they must be in intervening to protect an endangered child; or, alternatively, how far they may go in turning a blind eye to a child's plight, so long as they do not themselves physically commit the abuse.

Finally, on the assumption that a declaration of the application of Sec. 1983 to these aggravated cases would engender more emphatic protection of endangered children, one can expect that there are presently alive in this country children who are being physically abused who will benefit directly from a Court-

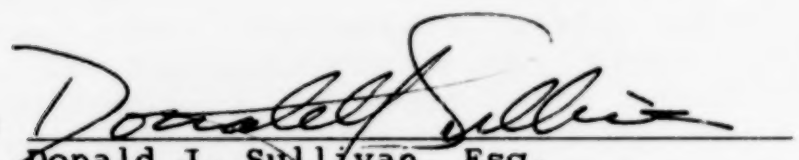
encouraged increase in vigilance by the designated public authorities, in cases like this one where the authorities have actual knowledge of the pattern of abuse.

CONCLUSION

For the reasons noted, resolution by this Court of the questions presented is both appropriate and urgent, and the writ of certiorari should issue.

Dated this 14th day of July, 1987.

JOSHUA DESHANEY et al., Petitioners

by: 

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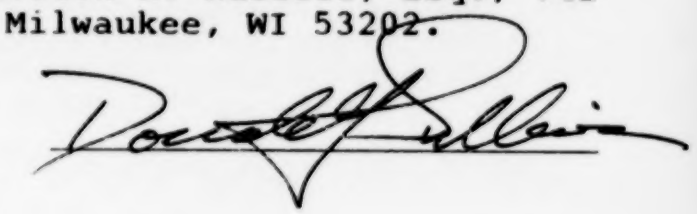
CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of July, 1987, a true and accurate copy of the foregoing Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to: Mark J. Mingo, Esq., 611 N. Broadway, Milwaukee, WI 53202; John Possi, Esq., P.O. Box 1807, Madison, WI 53701; and Patrick R. Russell, Esq., 741 N. Milwaukee, Milwaukee, WI 53202.



In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2188

JOSHUA DESHANEY, a minor, by his guardian ad litem, Curry First, Esq.; and MELODY DESHANEY,

Plaintiffs-Appellants,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al ,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin, Milwaukee Division.
No. 85 C 310—**John W. Reynolds,** *Judge.*

ARGUED JANUARY 13, 1987—DECIDED FEBRUARY 12, 1987

Before POSNER and COFFEY, *Circuit Judges*, and GRANT, *Senior District Judge.**

POSNER, *Circuit Judge.* This appeal requires us to decide whether a reckless failure by Wisconsin welfare authorities to protect a child from a parent's physical abuse deprives the child of liberty or property within the meaning of the Fourteenth Amendment.

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* Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

Since the case was dismissed on summary judgment, we state the facts as favorably to the plaintiffs as the record will allow. The principal plaintiff, Joshua DeShaney, was born in 1979, the son of Melody and Randy DeShaney (Melody is also a plaintiff). Joshua was born in Wyoming, where the DeShaneys then lived and where his mother still lives. In 1980 a court in Wyoming granted the DeShaneys a divorce. The court awarded custody of Joshua to his father. Shortly afterward, Randy moved to Wisconsin, bringing Joshua with him. There he married (and shortly afterward divorced) a woman whose lawyer told the police in 1982 that Randy had "hit the boy, causing marks and is a prime case for child abuse."

In January 1983, Randy DeShaney's girlfriend, Marie, brought Joshua to a hospital. He was covered with bruises and abrasions—from an attack by another child, she said, but the emergency room personnel suspected child abuse. They notified the Winnebago County Department of Social Services immediately, and by the end of the day that Joshua had been admitted to the hospital the Department had obtained an order from a Wisconsin juvenile court placing him temporarily in the hospital's custody. See Wis. Stat. §§ 48.13(3), 48.19, 48.207. Three days later an ad hoc "child protective team," consisting of a pediatrician, a psychologist, a police detective, a lawyer for the county, a caseworker for the Department named Ann Kemmeter, her superior, and others, discussed the situation. On the basis of this discussion the county's lawyer decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court (authorized by Wisconsin law if "probable cause exists to believe that if the child is not held he or she will . . . be subject to injury by others," Wis. Stat. § 48.205(1)(a); see also §§ 48.19, 48.21). So Joshua was returned to Randy DeShaney's custody. The team recommended, however, that Randy be required to enroll Joshua in the Headstart program, receive counseling from the Department, and tell Marie to move out of Randy's house—for Randy had suggested that she might be abusing Joshua. This recommendation was

embodied in a written agreement between Randy and the Department, a form of informal disposition of juvenile cases that Wisconsin law authorizes. See Wis. Stat. § 48.245.

Three weeks later the court closed the child-protection case that the Department had brought. A month after this Ann Kemmeter received word from the hospital that Joshua had again been treated for suspicious injuries. But after talking to the hospital's social worker she concluded that there was no evidence of child abuse.

Ann Kemmeter visited the DeShaney household in May. She noticed a bump on Joshua's forehead. Randy and Marie said he had gotten it falling off a tricycle. Kemmeter visited the household again in July, and noticed that Marie still hadn't moved out and that Joshua still hadn't been enrolled in Headstart. In September she visited again and asked to see Joshua but was told by someone that Randy and Marie had taken Joshua to the emergency room with a scratched cornea. In October she visited again and noticed another bump on Joshua's head. On her next visit, which was in November, she noticed that Joshua had a scrape on his chin; it looked to her like a cigarette burn. Later that month Joshua was treated at the emergency room for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. Emergency room personnel notified the Department of Social Services that they believed that he was a victim of child abuse, but there was no reaction from the Department.

Kemmeter next visited the DeShaney household in January (1984), but was told she couldn't see Joshua because he was in bed with the flu. She returned on March 7 and was told that several days earlier Joshua had fainted in the bathroom for no apparent reason. She did not ask to see him on this occasion—and has not been able to give a reason why not. The next day Randy DeShaney beat Joshua so severely that he critically injured Joshua's brain. The neurosurgeon who treated Joshua found evidence of previous traumatic injury to the head, and Joshua's body was covered with bruises and lesions of different vintages. Joshua's mother was summoned from

Wyoming. When she arrived Kemmeter told her, "I just knew the phone would ring some day and Joshua would be dead." He was not dead, but half his brain had been destroyed. He is confined to an institution for the profoundly retarded, and will remain institutionalized for the rest of his life. Randy DeShaney was convicted of child abuse and given a sentence of two to four years in prison.

This suit, brought by Joshua and his mother, charges Winnebago County, its Department of Social Services, Ann Kemmeter, and her supervisor with having deprived Joshua of his liberty without due process of law, in violation of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1 imposes liability on anyone who, acting under color of state law, "subjects, or causes to be subjected," a person to "the deprivation of" his federal rights. The complaint contains a "pendent party" claim against Randy DeShaney, see *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1359-61 (7th Cir. 1985) (separate opinions), but the district court relinquished jurisdiction of this claim when it dismissed the federal claim on the defendants' motion for summary judgment, see *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). The court held that the failure of a state agency to render protective services to persons within its jurisdiction does not violate the due process clause.

There are two possible theories on which the defendants (excluding Randy DeShaney, who is not a defendant in the section 1983 count and who was not acting under color of state law when he abused his son) might be thought to have violated Joshua DeShaney's Fourteenth Amendment rights. First, the defendants might be thought to have deprived him of a right—a form of liberty or property—to be protected by the Department of Social Services from the brutalities perpetrated by his father. Second, they might be thought to have deprived him of his right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause) by failing to protect him from his father.

The first theory is foreclosed by the rule, well established in this circuit, that the state's failure to protect

people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty. See, e.g., *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986); *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Beard v. O'Neal*, 728 F.2d 894, 898-900 (7th Cir. 1984); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The First, Eleventh, and District of Columbia Circuits have adopted our view, see *Estate of Gilmore v. Buckley*, 787 F.2d 714, 720-23 (1st Cir. 1986); *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986); *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986), and there is also support for it in the Sixth Circuit, see *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986). These cases are based on the principle that the Constitution is a charter of negative rather than positive liberties; and while there are exceptions to this as to virtually all legal generalizations—exceptions well discussed in Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986)—none of them is applicable here. The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents. The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services. For such failures, political remedies (along with such legal remedies as states might see fit to provide in their own courts) were assumed to be adequate. The state may not invidiously withdraw its protection from a disfavored minority without violating the equal protection clause in its most fundamental sense, *Bohen v. City of East Chicago, Inc.*, 799 F.2d 1180, 1190 (7th Cir. 1986) (concurring opinion), but that is not suggested in this case.

So we do not think that the plaintiffs can complain that Joshua was deprived of a federal constitutional right to effective protection from his father, but maybe he can

complain that the state was complicit in the beatings. The terrible injuries that Joshua sustained, which have essentially immobilized him for life, have deprived him of his liberty within the meaning that the courts have given this word in the due process clauses. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Fernandez v. Leonard*, 784 F.2d 1209, 1214-15 (1st Cir. 1986). The question is whether the state shares responsibility for this deprivation, in a federal constitutional sense, with Joshua's father.

We may assume without having to decide that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of *Daniels v. Williams*, 106 S. Ct. 662, 665, 667 (1986), and *Davidson v. Cannon*, 106 S. Ct. 668, 670 (1986), which hold that simple negligence does not violate section 1983. However, if the defendants, though blameworthy, did not cause Joshua's injuries, they cannot be said to have deprived him of his liberty; deprivation implies causation. And if the conduct of the Department of Social Services didn't appreciably increase the probability of Joshua's injuries, then under conventional tort principles of causation (illustrated by *Weeks v. McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898)), which are presumptively applicable to statutory and constitutional torts as well as to common law torts, see, e.g., *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983), and cases cited there, the Department did not cause those injuries.

The question how much of an increase in probability is necessary to make an anterior event a "cause" for purposes of tort liability is a vexed problem in the law of torts generally; but we shall not have to explore its outer boundaries in this case; for if the increase in probability is trivial, then under no view of tort liability can the defendant be held to have caused the injury complained of. That is the situation here. This can be seen most clearly by asking whether, if the Department had never existed, Joshua would have sustained the injuries for which he is seeking damages in this suit. The answer, almost certain-

ly, is "yes." For we are supposing a case where the State of Wisconsin has no institutional commitment to preventing child abuse—a gap in its laws that, as we said earlier, would not be actionable in a suit under section 1983. It is unlikely that Ann Kemmeter's well intentioned but ineffectual intervention did Joshua any good at all, but it is most unlikely that it did him any harm. She merely failed to protect him from his bestial father.

Of course in any case of a botched rescue attempt it is possible to speculate that the victim would have been better off without the attempt, because it may have impeded competent attempts at rescue that would have succeeded. This is one of the common rationales offered for the common law tort rule that makes a rescuer liable for his negligence in rescuing even if he had no duty to attempt the rescue in the first place. See, e.g., *United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955). The rule, however, is broader than this rationale; the plaintiff complaining of the defendant's negligent manner of rescue need not prove that, as a matter of fact, the defendant's failure to complete the rescue made it less probable that someone else would rescue him. See *Jackson v. City of Joliet*, *supra*, 715 F.2d at 1202-03. Constitutional tort law, however, which ties a defendant's liability to *depriving* the plaintiff of some right, cannot follow this path of expansion. A state can if it wants, whether acting through its courts or its legislature, impose tort duties on persons who fail to rescue someone whose peril they did not cause—whose liberty they did not take away—but a constitutional tort requires deprivation by the defendant, and not merely a failure to protect the plaintiff from a danger created by others. Thus we held in *Jackson v. City of Joliet*, *supra*, 715 F.2d at 1205—a case in which a policeman waved traffic around a burning car without bothering to look inside (where the plaintiffs' decedents were burning to death)—that a merely conjectural possibility that the state's inaction warned off other potential rescuers is not enough to make the state complicit (in a federal constitutional sense) in the private conduct that caused the victim's injury.

This conclusion is supported by the Supreme Court's holding in *Martinez v. California*, 444 U.S. 277, 285 (1980), that the fact that state inaction might be deemed a proximate cause of the plaintiff's injury under evolving common law notions is not enough to establish a violation of the Fourteenth Amendment. The states are free in the administration of their own tort law to attenuate the requirement of causation as far as they want, even to the point, as we have said, of eliminating it entirely; but deprivation in the constitutional sense requires more than a minimal or fictitious causal connection between the action of the state and the injury of the plaintiff. That the state's inaction may have brought about a trivial increase in the probability that Joshua would be severely injured by his father does not enable a conclusion that the state deprived Joshua of his right to bodily integrity.

The botched rescue must be distinguished from the case where the state places the victim in a situation of high risk, thus markedly increasing the probability of harm and by doing so becoming a cause of the harm. If the state, having arrested a child's parents, leaves the child alone in a situation where he is quite likely to come to grief because no one is watching over him, and he is injured, the state is a cause of the injury. That was *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). This case is different. The Department of Social Services did not place Joshua in his father's custody; a Wyoming juvenile court did that. It is true that three days after temporarily placing Joshua in the custody of the hospital to which he was brought in January 1983, the Department returned him to his father. If in doing so the Department was recklessly placing him in a position of great danger, it might be responsible for what ensued—though to hold that it was would require us to take a step beyond *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), where the welfare department placed a child with foster parents and thus retained custodial responsibility. See *id.* at 141. But there is no evidence that the Department was reckless in returning Joshua to the custody of his father

back in January 1983. If at that time the Wisconsin authorities had tried to terminate Randy's parental rights, he might well have sued them under 42 U.S.C. § 1983, charging an unconstitutional deprivation of his rights as a father, as in *Lossman v. Pekarske*, *supra*, where another Wisconsin father suspected of child abuse brought just such a suit; or under state law, relying on such cases as *LaChapell v. Mawhinney*, 66 Wis. 2d 679, 225 N.W.2d 501 (1975), which held that as a general rule a child's best interests are served by living in a parent's home, rather than in the home of a more distant relative or in a foster home. The recklessness in this case came later, when Ann Kemmeter inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father. And by then Joshua was back in his father's lawful custody. Had Joshua been a foundling in the custody of the state, which then placed him with foster parents whom it knew or strongly suspected would abuse the child, this case would be like *Doe v. New York City Dept. of Social Services*, *supra*, 649 F.2d at 138-40, 142. But he was not.

We reject the proposition embraced by a divided panel of the Third Circuit in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985), that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from the abuse. *Estate of Bailey* (and dicta in *Jensen v. Conrad*, 747 F.2d 185, 190-94 (4th Cir. 1984), where, however, the court found it unnecessary to decide whether the facts established a "special relationship," see *id.* at 195; *id.* at 196 (concurring opinion)) is inconsistent with *Bowers*, *Jackson*, and other cases in this circuit cited earlier. It is also inconsistent with *Estate of Gilmore v. Buckley*, *supra*, which expressly rejected *Estate of Bailey*, in part in reliance on our decisions in *Beard* and *Jackson*. We can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of "special relationship."

See Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. Chi. L. Rev. 1048, 1061 (1986). It is true that there is a "special relationship" between a prison and its inmates which imposes on the prison a constitutional duty (although a severely limited one) to protect an inmate from the violence of his fellow inmates, see, e.g., *Ellsworth v. City of Racine*, 774 F.2d 182, 185 (7th Cir. 1985); what is special, however, is that the prison authorities, having placed the inmate in a position of danger, cannot shrug off all responsibility when the danger materializes and injury results. That analysis has no force in a case such as this, where the victim was in a position of danger by virtue of the decision of authorities in another state to place him in the custody of his father, a decision in which the defendants in this case were not involved. See *Washington v. District of Columbia*, *supra*, 802 F.2d at 1481.

The concept of special relationship, when extended as far as the Third Circuit extended it in *Estate of Bailey*, makes it more costly for a state to provide protective services to an individual in need, since by doing so it may be buying itself a lawsuit should its efforts fail. Moreover, the idea that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would inject the federal courts into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts administering constitutional law than by the state judicial and administrative authorities. "The federal courts . . . are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity." *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982). To place every state welfare department on the

razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principle.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, Curry First, Esq. and MELODY DeSHANEY,

Plaintiffs

v. Civil Action
No. 85-C-310

RANDY DeSHANEY, WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Defendants.

DECISION AND ORDER

This action is brought by plaintiffs under the common law of negligent and intentional torts and under 42 U.S.C. Sections 1983, 1985 and 1988. The plaintiffs, a mother and her infant son (through his Guardian ad Litem) allege that the child's father, the defendant Randy DeShaney, beat the child repeatedly over many months, causing permanent brain damage, retardation and total disability, and that the other defendants knew of this on-going child-abuse, had both a duty and the legal authority to intervene, but failed to do so in time to prevent debilitating injury to the child.

Presently before the Court is the

motion by the defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse to dismiss the complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), and for judgment on the pleadings, Fed.R.Civ.P. 12(c). The parties sought to supplement the pleadings with affidavits, and excerpts from deposition transcripts. Therefore, the Court decided on January 29, 1986, to treat defendant's motion as one for summary judgment. The parties have had the opportunity to file supplementary briefs and affidavits. The defendants' motion is now ready for decision.

FACTS

The plaintiff Joshua DeShaney was born on March 21, 1979. He presently resides in Wisconsin in a foster home for severely handicapped children. Plaintiff Melody DeShaney is an adult resident of Wyoming, and the natural mother of Joshua DeShaney. Melody and defendant Randy DeShaney, Joshua's natural father, were divorced in 1980. Pursuant to the divorce decree Randy DeShaney retained custody of Joshua DeShaney. At all times relevant to this litigation, except for a two or three day period in January 1983, Randy DeShaney had custody and control over his son. On or about March 8, 1984,

Randy DeShaney severely beat Joshua DeShaney. As a result of the beating the child suffered permanent brain damage.

The defendant Ann Kemmeter was at all times relevant to this litigation a social worker employed by the defendant Winnebago County Department of Social Services and the case worker directly responsible for Joshua DeShaney. The defendant Cheryl Stelse was at all times relevant to this litigation a social worker employed by the defendant Winnebago County Department of Social Services. Her responsibilities included assigning and supervising cases and caseworkers and administering federal and state law relevant to child welfare. She

was the immediate supervisor of defendant Ann Kemmeter. The defendant Winnebago County Department of Social Services is an agency of the defendant Winnebago County, which is a municipal corporation of the State of Wisconsin. The Court shall refer to these defendants collectively as the "public defendants" to distinguish them from defendant Randy DeShaney.

On January 27, 1982, the public defendants first received information suggesting that Randy DeShaney abused his son. Winnebago County police forwarded to them a report from Christine DeShaney, another former spouse of Randy DeShaney, that Randy had in the past "hit the boy

cuasing (sic) marks and is a prime case for child abuse." At the time of the report Christine DeShaney was in the process of divorcing Randy DeShaney.

On January 22, 1983, emergency room personnel at the Theda Clark Regional Medical Center in Neenah, Wisconsin, contacted the public defendants after becoming suspicious that Joshua was the victim of child abuse. On that occasion Joshua had been brought in by Marie DeShaney, Joshua's aunt by marriage and Randy DeShaney's "girlfriend". The child had numerous bruises and abrasions over his entire body. Marie DeShaney claimed that Joshua's injuries occurred when another child struck him with a metal toy

truck. Later that day, at the public defendant's request, the Winnebago County Juvenile Court placed Joshua in the temporary custody of the Medical Center.

On January 25, 1983, a "child protective team" meeting was held at the Medical Center. The team consisted of Medical Center personnel, a pediatrician, a psychologist, defendants Ann Kemmeter and Cheryl Stelse, representing the Department of Social Services, an assistant corporate counsel for defendant Winnebago County, and a representative of the Neenah police department.

It was decided at this meeting that there was insufficient evidence of child abuse to bring the case before the

juvenile court. After talking with Randy, Marie and Christine DeShaney, defendant Ann Kemmeter apparently concluded that Randy DeShaney "lacked parenting skills" but was not abusing Joshua. Randy suggested that Marie DeShaney might be abusing Joshua, but Kemmeter thought that unsupervised rough play involving two other children in the household might have produced Joshua's injuries. However, the psychologist recommended several measures designed to protect Joshua and to facilitate monitoring the child's situation, including enrolling him in a Headstart program, providing counselling services for father and son, and encouraging Randy

DeShaney to ask Marie DeShaney, the aunt who brought the child into the Medical Center, to leave the DeShaney household. The public defendants prepared a "social service contract" embodying these recommendations in an effort to secure Randy DeShaney's voluntary cooperation. Proceedings in the juvenile court were terminated and Joshua was returned to his father on January 25, 1983.

Defendant Ann Kemmeter made six visits to the DeShaney home during the six months following the January 22, 1983, incident.

On March 15, 1983, Kemmeter received another report from emergency room personnel that Joshua had been

treated for suspicious injuries possibly produced by child abuse. Kemmeter concluded, however, apparently on the basis of information she received by telephone from the hospital social worker, that there was "no evidence of actual child abuse". Nevertheless, she continued to visit the DeShaney home.

During a visit to the DeShaney household on May 2, 1983, Kemmeter noticed a bump on Joshua's forehead, which the DeShaneys said occurred when Joshua fell from a tricycle. As of July 13, 1983, Kemmeter noted, Marie DeShaney had not moved out of the house and Joshua had not been enrolled in a Headstart program. Kemmeter also noted that

Joshua, who was four years old at the time, was trained to make his bed and prepare his own breakfast every morning. When during a visit to the DeShaney home she remarked that Randy and Marie expected too much from a child of Joshua's age, Randy assured her that Joshua did these things willingly.

Between July 1983 and January 1984 Kemmeter was able to meet with the DeShaney family at home on only one occasion, during which time Kemmeter apparently heard Marie and Randy DeShaney verbally threaten Joshua. On September 21, 1983, when Kemmeter attempted to visit the family, she was told that the couple had taken Joshua to an emergency

room for a scratched cornea. On October 19, 1983, she noticed that Joshua had another bump on the forehead; on November 9, 1983, she noticed Joshua had a "scraped chin" that appeared to her to be a cigarette burn. The City of Oshkosh police responded to complaint calls regarding family violence involving Marie and Randy DeShaney on at least five occasions during the last four months of 1983 and on one occasion in early January of 1984.

On November 30, 1983, Joshua was treated at the emergency room of the Mercy Medical Center in Oshkosh, Wisconsin, for a laceration to his right forehead, a bloody nose, a swollen left

ear and bruises on both shoulders. The adult accompanying Joshua explained that he had fallen in the bathroom and hit his head on the toilet. Two emergency room nurses at the medical center reported to the public defendants following this incident their belief that Joshua was the victim of child abuse.

When Kemmeter visited the DeShaneys on January 18, 1984, she was told she could not see Joshua because he was in bed with the flu.

On March 7, 1984, Kemmeter paid an unannounced visit to the DeShaneys and found Marie and Randy DeShaney decorating a birthday cake for Joshua. Kemmeter noted that the atmosphere in the home

seemed calm despite the fact that Marie had a split lip and swollen nose. The couple mentioned that several days earlier Joshua had fainted in the bathroom for no apparent reason. Kemmeter did not, however, ask to see Joshua.

On March 8, 1984, Joshua Deshaney suffered critical injuries to the brain while being beaten by his father Randy DeShaney. The neurosurgeon who operated on Joshua found extensive evidence of prior traumatic injury to the head. Joshua's body was covered with bruises and lesions of varying age.

LEGAL ANALYSIS

An initial inquiry in a Section

1983 claim is whether the conduct plaintiffs complain of deprived them of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). The Fourteenth Amendment's concept of liberty does not include the right to basic public services. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983).

> [T]here is no constitutional right to be protected by the state against [crimes committed] by criminals or madmen. it is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services . . .

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)

However, when a municipality puts a particular individual in a position of danger from private persons it creates or assumes a special relationship with such an individual, from which relationship a duty to provide basic protective services may arise. Ellsworth v. City of Racine, 774 F.2d 182, 185 (7th Cir. 1985).

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake

pit.

Bowers v. DeVito, 686 F.2d at 618. Knowledge by a state official that his action or inaction while under a duty to act subjects a particular person to known dangers may amount to gross negligence and subject the official to liability under 42 U.S.C. Section 1983 for the harm which results from such action or inaction. See White v. Rochford, 592 F.2d 381, 385 (7th Cir. 1979).

However, absent the sort of special relationship described above the mere assumption by a municipality of a duty to protect an individual does not give that individual a Section 1983 claim for the negligent performance of that duty, since

Section 1983 "imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Ellsworth, 774 F.2d at 186 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)). A remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Id. From the foregoing one may deduce that a special relationship exists only where the state is under a constitutional duty of care.

The Court knows of no bright line test by which the existence of a special relationship for Section 1983 purposes may be determined. Examples of action by

officials which creates or assumes a special relationship include leaving minor children stranded in an automobile after arresting their guardian, White v. Rochford, 592 F.2d at 382, deliberately exposing mental patients or prison inmates to a known risk of assault, Spence v. Staras, 507 F.2d 554 (7th Cir. 1974), deliberately denying a prisoner needed medical treatment Benson v. Cady, 761 F.2d 335 (7th Cir. 1985), and merely to be present when a fellow police officer begins to beat a person in custody, Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

This case is not sufficiently similar to such cases to support a

finding that a special relationship existed between Joshua DeShaney and the public defendants. Neither Joshua nor his father were in state custody either at the time of or immediately prior to the beating. None of the public defendants were present when the beating took place. Nor can the Court say, even after drawing all the inferences to which plaintiffs are entitled, that the public defendants deliberately exposed Joshua to known danger.

Plaintiffs propose that the Court employ a test adopted by the United States Circuit Court of Appeals for the Third Circuit in a factually similar case to determine whether a special

relationship exists here. Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985). Under the proposed test custody of the plaintiff at the time of the injury may not always be a prerequisite to a special relationship. Estate of Bailey, 768 F.2d at 509 (quoting Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984)). Factors to be considered under this test in determining whether a special relationship exists include

> whether the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight.

Estate of Bailey, 768 F.2d at 509 (citing Jensen v. Conrad, 747 F.2d at 195-96, n. 11). The Court cannot adopt this test because it would provide claims under Section 1983 to plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression, Davidson v. Cannon, ____ U.S. ____, 106 S.Ct. 668, 670 (1986), claims which recent rulings by the United States Supreme Court appear to preclude, id. (prisoner assaulted by fellow inmate two days after informing prison superintendent of threatened attack has no claim under Section 1983 for prison authorities' merely negligent failure to protect him); Daniels v.

Williams, ____ U.S. ____, 106 S.Ct. 662 (1986) (prisoner injured after slipping on a pillow negligently left on jail stairs has no claim under Section 1983).

In particular, the second factor of the Estate of Bailey test -- whether the state has expressly stated its desire to provide affirmative protection to a particular class cr specific individuals -- is unsound. This factor would favor Section 1983 liability in any case where state officials acted under color of a law containing an expression of legislative intent to protect one or another of the socially or economically deprived classes of our society. Each such law sould give rise to a "special

relationship" of constitutional duty to achieve the legislature's intent as soon as a state official took action with respect to a member of the protected class. Every social welfare program would thus become a charter of constitutionally sanctioned social and economic "rights" which, unlike the civil and political rights traditionally protected by Section 1983, require much more than the restraint of governmental power to guarantee.

However, even were this test to be adopted in this circuit, the Court could not find a special relationship in this case. The first factor weighs too heavily against the existence of such a

relationship since neither the victim nor the perpetrator of this assault had been in state custody at the time of or immediately prior to the March 8, 1984, beating. The fact that the Theda Clark Regional Medical Center held Joshua under a protective custody order for three days some thirteen months prior to the March 1984 beating indicates no more than that efforts were made at that time to protect a child in the legal custody of one of his natural parents from possible child abuse. Such temporary custody more than one year prior to the incident complained of did not give rise to a relationship with the public defendants sufficiently similar to the relationship between the

state and a prisoner incarcerated in one of its penal institutions so as to hold such defendants liable under Section 1983.

The Court finds, therefore, that the public defendants are entitled to judgment as a matter of law on plaintiffs' Section 1983 claims.

The claim for civil rights conspiracy under 42 U.S.C. Section 1985 fair no better because there was no underlying violation of plaintiffs' Section 1983 rights. Moreover, Section 1985 applies only to tortious interference with constitutional rights that is motivated by a racial or other class-based, invidiously discriminatory

animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Huebschen v. Department of Health and Social Services, 716 F.2d 1167, 1171 (7th Cir. 1983); Briley v. California, 564 F.2d 849 (9th Cir. 1977). There appears to be no evidence of any such animus in this case.

The remaining claims against the public defendants and against Randy DeShaney sound in state tort law. Since no federal questions remain for the Court to decide, it shall relinquish its pendant claim jurisdiction over these state law claims and dismiss them without prejudice. See Duckworth v. Franzen, 780 F.2d 645, 656 (7th Cir. 1985).

ORDER

IT IS THEREFORE ORDERED that the motion of defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse for summary judgment is granted; judgment shall be entered in favor of said defendants on plaintiffs Joshua DeShaney's and Melody Deshaney's claims under 42 U.S.C. Section 1983 and 1985; plaintiffs' claims against said defendants and against defendant Randy DeShaney under state tort law are dismissed without prejudice.

Dated at Milwaukee, Wisconsin, this 20th day of June, 1986.

BY THE COURT:

/s/ John W. Reynolds
Chief Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOSHUA DeSHANEY, et al.

v. Docket No. 85-C-310

WINNEBAGO COUNTY, et al.

NAME OF JUDGE OR MAGISTRATE:
John W. Reynolds

Decision by Court. This action came to consideration before the Court with the judge (magistrate) named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

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that the motion to dismiss of defendants State of Wisconsin, Wisconsin Department of Health and Social Services, and Linda Reivitz is GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that the motion for summary judgment of

defendants Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse is GRANTED as to plaintiffs' claims under 42 U.S.C. Sections 1983 and 1985.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' claims under state tort law against said defendants and defendant Randy DeShaney are DISMISSED WITHOUT PREJUDICE.

Date: 6/20/86

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, IL 60604

February 12, 1987

BEFORE

Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

JOSHUA DeSHANEY, a Minor, by his Guardian ad Litem, Curry First, Esq., and MELODY DeSHANEY,
Plaintiffs-Appellants

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants-Appellees.

No. 86-2188

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 85 C 310

Judge John W. Reynolds

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

_____

*Hon. Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

April 21, 1987

BEFORE

Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

JOSHUA DeSHANEY, a minor,
by his guardian ad litem, Curry First, Esq., and MELODY-DeSHANEY,
Plaintiffs-Appellants,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants-Appellees

No. 86-2188

Appeal from the United States District Court for the Eastern Distrct of Wisconsin, Milwaukee, Division.

No. 85 C 310
John W. Reynolds, Judge.

ORDER

On February 25, 1987, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

*Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.